STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL HEINRICH,

Plaintiff-Appellant,

v

MARVIN PETTWAY, MICHAEL RUTKOFSKE, and ROBERT MILLER,

Defendants-Appellees.

UNPUBLISHED
November 19, 2020

No. 349954
Washtenaw Circuit Court
LC No. 18-001030-NO

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

In this suit to recover damages for injuries caused by a fallen tree, plaintiff Michael Heinrich appeals by right the trial court's order summarily dismissing his claims against defendants Marvin Pettway and Michael Rutkofske under MCR 2.116(C)(7) on the ground that Heinrich failed to establish a question of fact as to whether defendants' conduct amounted to gross negligence that was the proximate cause of Heinrich's injuries.[1] For the reasons explained below, we conclude that the trial court did not err when it dismissed Heinrich's claims against defendants. Accordingly, we affirm.

I. BASIC FACTS

This appeal involves Heinrich's claims that Pettway and Rutkofske breached their duties to protect him from a dangerous Red Oak tree located in a wooded lot on the University of Michigan's north campus near a pedestrian pathway. The wooded lot was just north of Hayward Street and across from the GG Brown Laboratory Building. Pettway, Rutkofske, and Robert Miller were all employed by the University in its forestry department, which was generally responsible

[1] Heinrich also sued Robert Miller, but Heinrich did not contest the motion for summary disposition with regard to Miller. Accordingly, we limit our discussion to whether the trial court properly granted the motion for summary disposition with respect to the claims against Pettway and Rutkofske.

for managing the University's trees. The forestry department was located on the University's north campus during the events at issue. The University hired Pettway to be its campus forester in 1988, and he served in that capacity—although under a different title—until his retirement in 2016. Rutkofske succeeded to Pettway's position after an initial period of service as the interim campus forester.

Pettway testified at his deposition that he inspected the University's wooded lots in the spring and fall of each year. In late summer or fall of 2014, Pettway walked alongside the wooded lot north of Hayward Street as part of his inspection regime and observed fungal fruiting bodies growing on the Red Oak tree, which concerned him. Pettway explained that some fungi can help a tree by providing nutrient and water uptake, but others can hurt a tree by preventing water and nutrient uptake or weakening root structures. He stated that there were also heart rot fungi that could directly work on the structures of the tree. Pettway agreed that there were fungi that cause root rot in trees, including Ganoderma and Armillaria. He stated that he had in the past identified Ganoderma by examining the fruiting body growing on a tree.

After he discovered the fruiting bodies on the Red Oak tree's roots, Pettway decided to formally inspect the tree and its roots. He asked Miller to use an air spade[2] to remove the soil around the roots so that he could better see them. He also invited an associate, Dr. David Roberts, who held a Ph.D. in botany and plant pathology, to examine with him the tree and the fungal fruiting bodies. Bill Lawrence, who was the former manager of forestry and horticulture for the Ann Arbor Department of Parks and Recreation, also accompanied Dr. Roberts and Pettway during the examination of the Red Oak tree. Both Dr. Roberts and Pettway examined the Red Oak tree's roots and determined that they did not show signs of rot. At the close of the examination, the three men agreed that the Red Oak tree appeared healthy, and Pettway decided that they would continue to keep the tree under observation. Pettway did not seek a formal identification of the fungus. Unbeknownst to Pettway, the fungus that produced the fruiting bodies was Inonotus dryadeus, a fast-acting fungus that damages roots without affecting the outer appearance of the tree.

After Pettway retired in 2016, Rutkofske continued Pettway's plan to monitor the Red Oak tree. The tree had a "Level 1" inspection status, which meant that it would be subject to a "drive-by inspection." He stated that they would look for signs of decline such as dieback, yellowing of leaves, smaller leaf size, and new fruiting bodies. Rutkofske indicated that the roots were not examined after the examination in 2014 and that no efforts were made to identify the fungus that had produced the fruiting bodies. Rutkofske claimed that he did not see any signs on the Red Oak tree that caused him alarm.

In April 2017, Heinrich was a student at the University and was to graduate with an engineering degree at the end of the month. Heinrich attended a meeting on the University's north campus on April 16, 2017. After the meeting ended at about 4:00 p.m., Heinrich got on his motorcycle and began to ride back to his apartment. As Heinrich rode westbound in the area of

[2] An air spade is a tool that uses compressed air to remove soil from tree roots. It loosens the soil without damaging the roots.

the 2300 block of Hayward Street, the Red Oak tree's roots gave way, and the tree fell on Heinrich. Heinrich suffered a spinal cord injury which rendered him a quadriplegic.

In October 2018, Heinrich sued Pettway, Rutkofske, and Miller for damages arising from the injuries he sustained when the tree fell on him. He alleged that Pettway, Rutkofske, and Miller each had a duty to protect the general public—including Heinrich—from the hazardous Red Oak tree. He alleged that they each had numerous duties related to the Red Oak tree, including: to gather information about the University's trees; to examine and document the condition of the trees; to take steps to ensure that the Red Oak tree was protected from harm, such as by completing a tree survey, a tree evaluation plan, and a tree protection plan before allowing improvements near the Red Oak tree; to remove dead, dying, or damaged trees; and to observe and rectify the hazardous condition the Red Oak tree posed, or to warn the public about the hazards the tree posed. Heinrich alleged that Pettway, Rutkofske, and Miller breached those duties and that those breaches amounted to gross negligence that defeated governmental immunity.

In May 2019, Pettway, Rutkofske, and Miller moved for summary disposition under MCR 2.116(C)(7). They argued that the undisputed evidence showed that each defendant acted with reasonable care such that no reasonable juror could find that any individual acts or omissions constituted gross negligence sufficient to overcome the immunity that each defendant enjoyed under MCL 691.1407. They also argued that Heinrich could not establish that any acts or omissions amounted to the one most immediate, efficient, and direct cause of his injuries.

In response, Heinrich argued that Pettway breached his duties in several ways. He contended that Pettway had a duty under the standards of the International Society of Arboriculture to perform a risk assessment on the Red Oak tree after he learned that construction may have damaged the tree's roots in 2012 to 2013. He maintained as well that an expert, Glen Stanosz, Ph.D., would testify that Pettway had to identify the fungus that created the fruiting bodies discovered in 2014, had to conduct a risk assessment, and had to remove the tree, which acts he failed to take. Heinrich noted in his brief that Dr. Stanosz testified at his deposition that the tree posed a high or extreme risk and should have been removed immediately. Heinrich also cited testimony by an expert mycologist, Harold Burdsall, Ph.D., in support of the proposition that the appearance of the fungal fruiting bodies demonstrated that the tree had already suffered extreme root damage. Heinrich argued that Rutkofske should have removed the tree after he took over as campus forester and that his disregard of safety was exemplified by his failure to do anything to investigate the report of fruiting bodies on other trees after the Red Oak tree fell.

The trial court held a hearing on the motion for summary disposition in June 2019. After hearing the arguments, the trial court determined that no reasonable jury could conclude that Pettway or Rutkofske engaged in conduct that amounted to gross negligence. The court stated that the evidence showed at most that defendants' conduct constituted ordinary negligence. The trial court also determined that the evidence showed that Pettway and Rutkofske's omissions were not the proximate cause of Heinrich's injuries. The court explained that the "one most immediate, efficient and direct cause" of the injury was the "tree falling" without any person causing it to fall. Accordingly, in July 2019, the trial court signed an order summarily dismissing Heinrich's claims. Heinrich now appeals in this Court.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

On appeal, Heinrich argues that the trial court erred in several respects when it granted defendants' motion for summary disposition under MCR 2.116(C)(7). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). "This Court [also] reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules." *Pransky v Falcon Group, Inc*, 311 Mich App 164, 193; 874 NW2d 367 (2015). We likewise review de novo the applicability of governmental immunity and the statutory exceptions to immunity. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

B. SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

MCR 2.116(C)(7) provides for dismissal of an action "because of . . . immunity granted by law." The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id*. This Court must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *Moraccini*, 296 Mich App at 391. When there is no factual dispute, the determination whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Id*. If, however, a relevant factual dispute does exist, summary disposition is not appropriate. *Id*. "If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010); see also *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013) ("[I]f the parties present evidence that establishes a question of fact concerning whether the defendant is entitled to immunity as a matter of law, summary disposition is inappropriate [and] . . . the factual dispute must be submitted to the jury.").

C. IMMUNITY FOR GOVERNMENTAL EMPLOYEES

MCL 691.1407, which is part of the governmental tort liability act, MCL 691.1401 *et seq*., provides, in pertinent part, as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer [or] employee . . . while in the course of employment or service . . . if all of the following are met:
>
> (a) The officer [or] employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Pettway and Rutkofske, as governmental employees, had the burden to raise and prove their entitlement to immunity as an affirmative defense. *Ray v Swager*, 501 Mich 52, 62; 903 NW2d 366 (2017); *Odom*, 482 Mich at 479.

It was undisputed that Pettway and Rutkofske were acting within the course of their employment in caring for and monitoring trees on University property, that they were acting within the scope of their authority when doing so, and that they were engaged in the exercise or discharge of a governmental function when managing the trees. Accordingly, Pettway and Rutkofske had immunity for their acts or omissions unless their conduct amounted to "gross negligence that [was] the proximate cause of the injury or damage." MCL 691.1407(2)(c).

D. GROSS NEGLIGENCE

On appeal, Heinrich first argues that the trial court misapplied the applicable precedents when evaluating the evidence submitted in support of and opposition to the motion for summary disposition. More specifically, he contends that the trial court erred when it adopted a definition of "gross negligence" that conflicted with the definition provided by the Legislature in MCL 691.1407. He maintains that the trial court improperly required proof that defendants exercised a total or complete lack of care.

"Gross negligence" is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Importantly and critically, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). In *Tarlea v Crabtree*, 263 Mich App 80, 81; 687 NW2d 333 (2004), this Court addressed the question whether high school football coaches were immune from suit for the death of a student football player while attending a three-day, preseason football conditioning camp. This Court discussed the "gross negligence" standard, observing:

> By statute, to be liable in tort, a governmental employee must act with gross negligence. Gross negligence is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.
>
> The much less demanding standard of care—gross negligence—*suggests*, instead, *almost* a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.
>
> As here, where defendants have taken numerous precautions and safeguards to protect the safety of the football players in their charge, an objective observer

> must conclude that the coaches exhibited not reckless conduct, rather, a heightened regard for the safety of the students. No reasonable person could conclude that they acted with reckless disregard. Rather, the coaches' conduct showed that they performed their duties in a manner that exhibited care and concern for the student athletes. Rather than a substantial lack of concern, the coaches showed substantial concern for the well-being of their students. [*Id.* at 90-91 (quotation marks and citations omitted; emphasis added).]

On appeal, Heinrich argues that this Court only discussed "an example of what gross negligence *suggests*, and not . . . what it actually suggests, but what it *almost suggests*." We conclude that the language in *Tarlea* that Heinrich seizes upon is consistent with the text of the statute and, regardless, the opinion is binding precedent. MCR 7.215(J)(1). Indeed, this Court in *Wood v Detroit*, 323 Mich App 416, 424; 917 NW2d 709 (2018), favorably cited the language from *Tarlea* quoted and emphasized above. Furthermore, the trial court did not misconstrue, misunderstand, or misapply the language from *Tarlea* highlighted by Heinrich, which the court *briefly and accurately* recited but did not make the focal point of its ruling from the bench. The trial court ruled as follows:

> Having fully reviewed the extensive record, the Court[] finds, in accordance with defendants' reasoning and argument, that[] no reasonable juror could conclude that defendants' conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." At best, the evidence viewed in the light most favorable to the plaintiff establishes only ordinary negligence. It is well settled that evidence of ordinary negligence does not create a material question of fact concerning gross negligence.

Simply put, the trial court made no error with respect to the citation and construction of the gross negligence standard.

E. THE EVIDENCE OF GROSS NEGLIGENCE

Heinrich also argues that the trial court erred when it dismissed his claims against Pettway and Rutkofske because he presented sufficient evidence to permit a reasonable jury to find that Pettway and Rutkofske's conduct demonstrated a substantial lack of concern for whether an injury resulted.

1. PETTWAY

The evidence before the trial court showed that Pettway was in charge of the forestry crew until his retirement in 2016. Pettway stated that the Red Oak tree was located in one of the University's wooded lots and that it was his practice to inspect the wooded lots approximately twice per year by walking their perimeter. During one of these walks, Pettway noticed fungal fruiting bodies on the Red Oak tree and became concerned about its safety.

The evidence showed that Pettway took several steps to evaluate the tree's safety after he became concerned. He asked Dr. Roberts to accompany him to the Red Oak tree in order to evaluate the tree's health. Dr. Roberts had years of experience with evaluating plants and held a degree in plant pathology. Lawrence also accompanied them to the tree, and he too had

considerable experience in evaluating the health of trees. Indeed, he served as the forester for the City of Ann Arbor. Pettway additionally had a member of the forestry crew—Miller—use an air spade to remove the soil from around the tree's roots so that he and Dr. Roberts could see them.

The evidence further demonstrated that after the men gathered at the Red Oak tree, Pettway and Dr. Roberts physically inspected the roots for evidence of disease or rotting and found none. Pettway did see some old damage, but he did not observe any new damage to the roots. Pettway also drilled into the roots to see if the wood was strong or instead showed signs of being "punky" or discolored. He saw nothing to raise concern.

Dr. Roberts and Pettway had some experience with fungal fruiting bodies, and they thought the fungus might be a fast-growing Ganoderma. Testimony established that unhealthy trees normally show visible signs of poor health in their crown when afflicted with root rot. Testimony also revealed that the mere presence of a fungal fruiting body, although evidence of potential disease, did not necessarily require immediate removal of the tree. In fact, both of Heinrich's experts confirmed that the mere presence of a fungal fruiting body does not by itself indicate that a tree must be removed.

Testimony established that Pettway, Dr. Roberts, and Lawrence all felt that the tree appeared healthy and that there was no indication that the tree was in imminent danger of falling. Nevertheless, Pettway believed that it was reasonable to place the Red Oak tree under observation should any issues develop as to the tree's health. The evidence showed that Pettway informed his crew to keep the tree under observation for signs of poor health and that he himself returned to inspect the tree on occasion until his retirement.

The evidence established that Pettway had created an inspection regime that was reasonably calculated to identify hazardous trees and which actually resulted in the Red Oak tree's being identified as a tree that had potentially been weakened. The evidence reflected that Pettway also took reasonable steps to evaluate the health of the Red Oak tree so that he could formulate a proper course of conduct. He personally inspected the tree along with two other persons with substantial experience in the evaluation of trees: Dr. Roberts and Lawrence. As noted, the inspection included excavating a portion of the tree's roots to better assess their health. All three men agreed that the tree looked healthy, and Dr. Roberts and Pettway opined that it was not in imminent danger of falling. Pettway determined that it would be reasonable to keep it under observation for visible signs of deterioration and instructed his forestry crew to keep the Red Oak tree under observation. He too returned to the Red Oak tree on occasion to evaluate its health. In the absence of evidence to the contrary, this evidence established that Pettway took reasonable steps to protect the public, which did not amount to gross negligence. See *Maiden*, 461 Mich at 126-127; *Tarlea*, 263 Mich App at 90-91.

In response to defendants' motion, Heinrich presented significant evidence that Pettway should have done more to protect the general public. He asserted that Pettway was obligated to follow the best management practices established by the International Society of Arboriculture and that, consistent with those standards, Pettway should have conducted a damage assessment for the Red Oak tree after Pettway discovered that construction had occurred in 2012-2013, which might have harmed the tree. Heinrich presented evidence that Pettway did not perform a damage assessment.

Heinrich also argued that Pettway had to perform a tree risk assessment when he discovered the fungal fruiting bodies on the Red Oak tree in 2014 and that he was obligated to take further steps to protect the public. Heinrich relied in significant part on Dr. Stanosz's testimony to establish what further steps Pettway should have taken. Dr. Stanosz opined that Pettway's inspection of the Red Oak tree in the fall of 2014 was not consistent with industry standards. More specifically, he claimed that Pettway failed to identify the particular organism that grew the fruiting bodies. He also believed that there should have been better reporting. Dr. Stanosz further stated that it was his opinion that had Pettway performed a tree risk assessment that was consistent with industry standards, he would have concluded that the tree posed a high or extreme risk and had it immediately removed. Dr. Stanosz asserted that even the information revealed during the inspection in 2014 showed that Pettway's failure to act fell below the standard of care. Dr. Burdsall similarly testified that even without knowing the identity of the fungus, the information revealed by the 2014 inspection should have led Pettway to order the Red Oak tree's immediate removal.

Heinrich cited testimony and evidence that the proper identification of the fungus was critical and that despite the importance of doing so, Pettway did not take available steps to definitively identify the fungus. Instead, Pettway just guessed what the fungus might be. Heinrich submitted evidence that the fungus that had infected the Red Oak tree—Inonotus dryadeus—is particularly dangerous: It rots the roots from the bottom up and does not create fruit until after it has already caused extensive damage to the roots. Heinrich, relying on Dr. Stanosz's opinion, maintained that Pettway should have conducted a better risk assessment and should have concluded that the Red Oak tree had to be removed immediately. Heinrich opined that the evidence permitted a finding of incompetence with regard to Pettway's handling of the tree and was adequate to enable a reasonable jury to find that Pettway's decision to just keep the tree under observation amounted to reckless conduct that demonstrated a substantial lack of concern for whether an injury would result.

The testimony and evidence cited by Heinrich may have given rise to an inference of negligence, but it did not establish a question of fact with respect to whether Pettway engaged in conduct that was so reckless that it demonstrated a substantial lack of concern for whether an injury resulted. See MCL 691.1407(8)(a). Although the evidence showed that Pettway did not perform any kind of assessment of the tree immediately after the construction work, Pettway nevertheless discovered signs that the Red Oak tree might be unhealthy on one of the inspections that he conducted after the construction. The evidence revealed that Pettway discovered fungal fruiting bodies on the Red Oak tree during one such inspection and determined that the presence of the fungal fruiting bodies was significant enough to warrant some risk assessment of the Red Oak tree. Stated differently, the evidence reflected that Pettway did not ignore the danger signs, but was in fact concerned and concerned enough to perform a fairly extensive investigation of the Red Oak tree with the assistance of other persons experienced in forestry management.

The evidence showed that Pettway invited another expert, Dr. Roberts, to render an opinion about the health of the tree, and Pettway had the roots excavated. In addition to observing the outward signs of the tree's health, Pettway took steps to directly test the strength of the root system, which appeared to him to be strong enough to support the tree. Dr. Roberts too tested the roots and did not see evidence of rotting. Pettway also considered the advice of Dr. Roberts. After determining that the tree did not pose a risk of immediate failure, Pettway created a plan to keep the tree under observation. These steps were evidence that Pettway was concerned about the

potential danger to the public, assessed the level of the danger, and adopted a plan consistent with his observations, experience, and the opinions of those present at the examination.

It was not sufficient to survive the motion for summary disposition for Heinrich to simply identify evidence that Pettway's conduct fell below the applicable standard of care, or even that it fell far below the standard of care. Instead, Heinrich had to present evidence that would allow a reasonable jury to find that Pettway's handling or monitoring of the Red Oak tree was not only reckless, but also was "*so* reckless" that it demonstrated not merely a lack of concern that an injury might occur, but a "*substantial* lack of concern for whether an injury" would result. MCL 691.1407(8)(a) (emphasis added). To meet that hurdle, Heinrich needed to present evidence that—when considered in the light most favorable to him—would permit a reasonable jury to find that Pettway simply did not care about the safety of the persons exposed to the danger posed by the Red Oak tree. See *Tarlea*, 263 Mich App at 90. This he did not do.

Heinrich's own expert, Dr. Stanosz, agreed that Pettway took appropriate steps to investigate the health of the tree when he assessed its risk in the fall of 2014. Dr. Stanosz merely felt that Pettway should have done more. Dr. Stanosz opined that Pettway violated the standard of care because he guessed the identity of the fungus that produced the fruiting bodies when he should have taken steps to definitively identify the fungus. Yet the evidence showed that Pettway did take steps to identify the fungus. He asked Dr. Roberts to look at the fruiting bodies and, although he declined to make a definitive identification, Dr. Roberts suggested that it might be a Ganoderma. Pettway had also in the past assessed fruiting bodies on the basis of his own years of experience, and he did not associate the fruiting bodies on the Red Oak tree with a root-rot type fungus. Pettway stated that it was his experience that performing a field identification of a fungus was appropriate, and Dr. Roberts agreed. Moreover, it was Pettway's experience that the mere presence of a fruiting body did not invariably mean that the tree was unhealthy. Dr. Stanosz confirmed that the presence of a fruiting body did not require immediate removal of a tree and that whether to remove the tree had to be determined after a proper risk assessment. Dr. Burdsall opined that it would be negligent to fail to identify the fungus.

The testimony that Pettway performed a field assessment of the fungus and failed to accurately identify the fungus was evidence of ordinary negligence. But evidence of ordinary negligence was insufficient. Even considering the evidence in the light most favorable to Heinrich, we agree the evidence did not establish that Pettway's failure to definitively identify the fungus was such a serious breach of the standard of care that a reasonable jury would be justified in disregarding the steps that Pettway actually took and conclude that his failure demonstrated that he had a "substantial lack of concern"—that is, did not care—as to whether the tree might fall and injure others. See MCL 691.1407(8)(a); *Tarlea*, 263 Mich App at 90-91.

Dr. Stanosz also opined that Pettway should have conducted a risk assessment consistent with the International Society of Arboriculture's risk assessment, which, in Dr. Stanosz's view, would have led to the conclusion that the Red Oak tree posed a high or extreme risk, and which, in turn, would have caused a reasonable arborist to have the tree removed. Notwithstanding his opinion that Pettway's examination of the tree was deficient, Dr. Stanosz acknowledged that all of the steps that Pettway took during the examination were appropriate for assessing the health of a tree. He also agreed that whether the evidence from the investigation revealed that the tree had

significant root rot was a matter of experience, knowledge, and expertise of the investigator, and that the decision whether to immediately remove the tree depended on such a risk assessment.

The evidence showed that Pettway conducted an evaluation and determined that there were no signs of root rot and that the tree did not need to be removed at that time. He further testified that it was his experience that a tree with root rot would in most cases show outward signs in its crown and that the Red Oak tree showed no such signs. Dr. Roberts also did not notice any signs of root rot on the tree, and Dr. Roberts and Lawrence all agreed that the tree looked healthy. Although Dr. Stanosz opined that it was inconceivable that the tree was not removed, his opinion was premised on the belief that a proper risk assessment would have revealed that the tree was unhealthy and posed a high or extreme risk. The same was true of Dr. Burdsall's opinion that the investigation should have revealed that the tree was already unhealthy. Their opinions about what the evidence would have revealed—even taken in the light most favorable to Heinrich—merely established that Pettway's assessment of the Red Oak tree did not meet the minimum standard of care. Consequently, the testimony by Dr. Stanosz and Dr. Burdsall that a better risk assessment would have led to the conclusion that the Red Oak tree should have been removed at that time did not amount to evidence of gross negligence; rather, it amounted to evidence of ordinary negligence, which was insufficient to overcome Pettway's immunity. See *Maiden*, 461 Mich at 126-127.

On this record, reasonable minds would not differ with respect to whether Pettway was grossly negligent. The undisputed evidence demonstrated that Pettway was concerned, took steps to assess the risk, and then put in place a plan to protect the public. Had Pettway discovered the fungal fruiting bodies on the Red Oak tree and done nothing in response, then a reasonable juror might conclude that gross negligence was involved. But the factual dispute identified by Heinrich in response to defendants' motion for summary disposition involved at most whether Pettway breached the standard of care and committed ordinary negligence. The testimony and evidence did not permit an inference that Pettway's conduct was "so reckless" that it "demonstrate[ed] a substantial lack of concern for whether" the tree might fall and injure someone. MCL 691.1407(8)(a). Consequently, the trial court did not err when it granted the motion for summary disposition with regard to Pettway.

2. RUTKOFSKE

Heinrich relies on much of the same evidence to establish that Rutkofske's conduct amounted to gross negligence. He asserts that Rutkofske had an independent duty to have the Red Oak tree assessed for risk once he took over as the campus forester. He similarly argues that had Rutkofske undertaken a proper risk assessment after he took over as forester, it would have revealed that the Red Oak tree's roots had progressively worsened and that it was necessary to remove the tree. Heinrich also maintains that the evidence showed that Rutkofske did nothing to evaluate another tree identified with the same fungus, which was further evidence that Rutkofske was grossly negligent.

Heinrich relies on Dr. Stanosz's averment that Rutkofske had to identify the fungus once he took over as the campus forester because the evidence showed that he knew that Pettway did not identify the fungus and that it needed to be identified to understand the risk. Dr. Stanosz also opined that Rutkofske operated on the mistaken assumption that observation would be adequate because trees with root rot always show outward signs of disease when afflicted with root rot,

which is not the case. Dr. Stanosz's averments did not establish grounds from which a reasonable jury could infer that Rutkofske's adherence to Pettway's plan to keep the Red Oak tree under observation without further investigation amounted to gross negligence.

Dr. Stanosz averred that trees do not always show outward signs of disease when suffering from root rot, but the fact that they do not *always* show such signs is not evidence that reliance on visual observation is so inherently unreasonable that anyone who relied on that method must have had a substantial lack of concern for whether the tree might fall and injure others. See MCL 691.1407(8)(a). Indeed, Pettway, Dr. Roberts, and Rutkofske testified that trees usually do show outward signs of disease when suffering from root rot. And Dr. Stanosz stated as well that he would begin a review of a tree's total health by observing whether the tree's system was operating properly—that is, producing leaves and showing a normal rate of growth for twigs and branches.

On this record, Dr. Stanosz's testimony established at most a question of fact as to whether Rutkofske's adherence to Pettway's original plan without taking additional steps to ensure that the tree had not weakened after the assessment in 2014 amounted to ordinary negligence. The testimony and evidence permitted a reasonable fact-finder to conclude that Rutkofske should have done more to ensure that the Red Oak tree had not developed root rot in the years after the 2014 assessment. But the fact that he was aware of Pettway's assessment and continued the plan put in place by Pettway demonstrated that he acted with enough concern for the general public that it cannot be said that he engaged in conduct that was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a); see also *Tarlea*, 263 Mich App at 90-91. Consequently, the trial court did not err when it dismissed Heinrich's claim against Rutkofske on the ground that Heinrich failed to establish a question of fact as to whether Rutkofske's conduct amounted to gross negligence that overcame his immunity.

III. CONCLUSION

Heinrich failed to establish a genuine issue of material fact with respect to whether defendants' conduct amounted to gross negligence; therefore, Pettway and Rutkofske were immune from liability as a matter of law and the trial court did not err in summarily dismissing the complaint under MCR 2.116(C)(7).[3]

We affirm. As the prevailing parties, Pettway and Rutkofske may tax costs under MCR 7.219(A).

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola

[3] In light of our ruling, it is unnecessary to address whether the trial court erred in concluding that defendants' conduct was not the proximate cause of Heinrich's injury.